The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02–13 OF 2005(S), 02–14 OF 2007(S)
ARIFIN ZAKARIA, AUGUSTINE PAUL AND ZULKEFLI FCJJ
25 MARCH 2008

Civil Procedure — Appeal — Grounds of judgment — Delay in delivering grounds of judgment — Validity of — Whether there was legal requirement for delivery of reasoned judgment — Whether delay sufficient ground to invalidate judgment — Rules of the Court of Appeal 1994 r 24

Company Law — Directors — Fiduciary duties — Whether misuse of trust information by director — Whether amounted to breach of fiduciary duty

There were two related appeals before the court. The first, was the Civil Appeal No 02–13 of 2007(S) ('the Zara Appeal') and the second, was the Civil Appeal No 02–14 of 2007(S) ('the Banita Appeal'). At the outset of the hearing the appellants in the Zara Appeal raised a preliminary objection in challenging the validity of the decision of the Court of Appeal dated 6 June 2003 on the following grounds: (1) whether the function of a judge of the Court of Appeal for the purpose of s 42 of the Courts of the Judicature Act 1964 ('CJA') includes the delivery of a reasoned judgment; (2) as to the operation of ss 38 and 42 of the CJA where a duly constituted Court of Appeal consisting of three judges has pronounced judgment in open court reserving its reasons; (a) only two such judges have subsequently provided written or any grounds of judgment; (b) these judges have both retired at the date their respective grounds of judgment are pronounced in open court; (c) the third judge has neither provided grounds of judgment of his own nor communicated his approval of the grounds of judgment of the others; and (d) the third judge has not been unable, through any known illness or any other cause, to provide any grounds of judgment of his own; (3) whether and in what circumstances inordinate delay affects the validity of a judgment; and (4) whether there had been inordinate delay which invalidated the judgment in these suits.

In the Zara Appeal, the appellants, the Sabah Foundation ('SF') and two of its subsidiaries had sued the first respondent, DSK and his company, the second respondent, Zara Sdn Bhd ('Zara'). SF was established under the Sabah Foundation Enactment 1996 with Tun Mustapha ('TM'), the then

Chief Minister of Sabah as the founding chairman. Zara was a land development company incorporated by DSK and his brother. DSK was the SF director and managing director of the second appellant, Sinsuran Sdn Bhd ('Sinsuran') and the third appellant, Seranum Sdn Bhd ('Seranum'). Sinsuran was incorporated to take over the development of buildings projects for SF known as the Tower. Whilst Seranum was duly issued with special timber licence and entered into an agreement with the State Government of Sabah whereby Seranum undertook to utilise the proceeds of exploitation of the timber land in and towards the construction of the Tower and also took the task of building a dual carriageway road known as the Coastal Highway. The appellants contended that DSK had failed to make full disclosure to SF of the Tower and the Coastal Highway projects. The implementation of these two projects had led to the allegations that DSK as a director of SF had committed SF to spend large sums of money as SF entered into contracts with the second and third appellants which benefited Zara. The issues derived from the appeal were whether DSK was in a position of a fiduciary and if he was in the position of fiduciary whether he had committed any breach of fiduciary duty.

In the Banita Appeal, Banita Sdn Bhd ('Banita'), the second appellant was incorporated by DSK in the name of nominees for the purpose of receiving a special timber license. It was the respondent's claim that DSK was guilty of a fraudulent and dishonest design and had acted in breach of his fiduciary duty as a director of SF and/or as a managing director of Seranum in that he had, inter alia, fraudulently concealed from the board of trustees of SF ('BOT') and Seranum the fact that Banita had applied for and been granted a special timber license and that he deliberately failed and neglected to make any disclosure of his control of and beneficial interest in Banita. The issue for determination in the appeal was whether a director of a corporation could be held liable for breach of fiduciary duty where the corporation was a contractor to the state government and the state government granted the relevant benefit to a company which was the nominee of the director.

Held, dismissing the appeals with costs:

(1) The decision of the Court of Appeal dated 6 June 2003 was and remained a valid decision of the Court of Appeal which was properly constituted when the decision was pronounced in open court in the presence of all the three Court of Appeal judges who were then still full serving members of the judiciary. The matter is governed by r 24 of the Rules of the Court of Appeal 1994 and that s 42 of the CJA is not relevant. Section 42 only applies where before the delivery of judgment, any judge of the court hearing the proceeding is unable, through illness or any other cause, to attend the proceedings or otherwise exercise his functions as a judge of that court. It is true that the judgment

pronounced by the Court of Appeal on 6 June 2003 was without written grounds of judgment and therefore there was no delivery of a reasoned judgment. However, the written grounds of judgments were delivered at a later date and thus there was in fact a reasoned judgment given (see paras 9 & 13–14).

(2) The court was also of the view that there was no legal requirement for the delivery of a reasoned judgment although generally it is good to give reasons in a judgment. Thus, in the context of the instant case the judgment pronounced by the Court of Appeal on 6 June even without reasons given is not illegal. Even though the third judge did not provide written grounds of judgment and had not communicated his approval of the grounds of judgment of the others, this did not in law nullify the two written judgments of the other two judges because the judgment pronounced on 6 June 2003 was a unanimous decision of the court (see paras 15–16).

(3) On the question of delay in delivering the grounds of judgment, the delay on its own is not sufficient ground to invalidate the judgment. The burden lay with the appellants to show how the delay had affected the judgment, for example the delay is such that the court misconstrued the facts or misapplied the evidence. The appellants had failed to show the Court of Appeal had committed such errors. The effective date for ascertaining whether the Court of Appeal was validly constituted was 6 June 2003. The validity was not affected by the delay in the judges providing the written grounds of judgment (see paras 17–19).

(4) DSK, at all material times had been both the managing director and secretary in subsidiaries of SF. Thus, from the position he held, DSK must be in a position of a fiduciary. On the facts and circumstances, DSK did not commit any breach of fiduciary duty. He did not use or misuse trust information belonging to the appellants. He did not place himself in a position where there was a conflict of interest. He acted in good faith towards the appellants and each of them. Due to the dominance of TM, DSK and his fellow directors had no choice but to comply at once with TM's directive and give effect to his decisions. If there was technically any breach of duty, the particular circumstances of this case were such that the court, in the exercise of its flexible jurisdiction, would take the stand that it should refuse to grant any relief to the appellants because it would be totally inequitable and contrary to conscience to do so (see paras 31 & 44).

(5) On the facts, it was the bounden duty of DSK to obtain informed consent from BOT before applying through Banita for special timber licence. DSK received information about Banita licensed area whilst in the capacity of chairman of negotiating team and at the same time was also a director of SF. Thus, DSK held the information about Banita

licensed area on trust for SF. In the circumstances, it was an appropriate case for the court to intervene with regard to this transaction effected by DSK and hold him liable for the Banita's unjust enrichment (see paras 54 & 56).

(6) DSK was in breach of his fiduciary duty to his principal, SF and a conflict of interest had arisen when he applied through Banita for the special timber license without the informed consent from BOT. On the facts and circumstances, the strict rule that a trustee must disgorge the entirety of any profit made by him in breach of fiduciary duty should be relaxed. It would not be inequitable or contrary to conscience to grant such reliefs as sought by the respondents (see para 57).

[Bahasa Malaysia summary

Terdapat dua rayuan yang berkaitan di hadapan mahkamah ini. Pertama adalah Rayuan Sivil No 02–13 Tahun 2007(S) ('rayuan Zara') dan kedua adalah Rayuan Sivil No 02–14 Tahun 2007(S) ('rayuan Banita'). Pada permulaan pendengaran perayu-perayu di dalam rayuan Zara telah membangkitkan bantahan awal yang mencabar kesahan keputusan Mahkamah Rayuan yang bertarikh 6 Jun 2003 atas alasan berikut (1) sama ada fungsi hakim Mahkamah Rayuan untuk tujuan s 42 Akta Mahkamah Kehakiman 1964 ('AMK') termasuk memberikan penghakiman yang beralasan; (2) berkenaan dengan pelaksanaan ss 38 dan 42 AMK yang memperuntukkan Mahkamah Rayuan terdiri daripada tiga hakim yang mengumumkan penghakiman di dalam mahkamah terbuka dengan menangguhkan alasannya; (a) hanya dua orang hakim yang telah menyediakan alasan penghakiman bertulis; (b) kedua-dua hakim ini telah bersara pada tarikh alasan penghakiman mereka dibacakan di mahkamah terbuka; (c) hakim ketiga tidak menyediakan alasan penghakimannya dan juga tidak menyatakan persetujuannya terhadap alasan penghakiman hakim yang lain; dan (d) hakim ketiga bukannya tidak mampu, disebabkan oleh apa-apa penyakit yang diketahui atau sebab yang lain untuk menyediakan alasan penghakimannya sendiri; (3) sama ada dan dalam keadaan bagaimana kelewatan yang melampau menjejaskan kesahan penghakiman; dan (4) sama ada terdapat kelewatan yang melampau yang mentaksahkan penghakiman dalam guaman-guaman ini.

Dalam rayuan Zara, perayu-perayu, Sabah Foundation ('SF') dan dua subsidiarinya telah menyaman responden pertama, DSK dan syarikatnya, responden kedua, Zara Sdn Bhd ('Zara'). SF telah ditubuhkan di bawah Sabah Foundation Enactment 1996 dengan Tun Mustapha ('TM'), bekas Ketua Menteri Sabah sebagai pengerusi pengasas. Zara adalah sebuah syarikat pemaju tanah yang ditubuhkan oleh DSK dan saudara lelakinya. DSK adalah pengarah SF dan pengarah urusan perayu kedua, Sinsuran Sdn Bhd ('Sinsuran') dan perayu ketiga, Seranum Sdn Bhd ('Seranum'). Sinsuran telah

diperbadankan untuk mengambil alih pembinaan projek bangunan untuk SF yang dikenali sebagai 'Tower'. Sementara Seranum telah diberikan dengan lesen pembalakan dan telah memasuki satu perjanjian dengan Kerajaan Negeri Sabah manakala Seranum telah mengakujanji untuk menggunakan hasil penggunaan tanah pembalakan terhadap pembinaan Tower dan telah mengambil tugas pembinaan dwi jalan raya yang dikenali sebagai Lebuh Raya Coastal. Perayu-perayu menegaskan bahawa DSK telah gagal untuk membuat pendedahan penuh kepada SF berkenaan dengan projek Tower dan Lebuh Raya Coastal. Pelaksanaan dua projek ini telah menjurus kepada dakwaan bahawa DSK sebagai pengarah SF telah menyebabkan SF membelanjakan sejumlah besar wang yang mana SF telah memasuki kontrak-kontrak dengan perayu kedua dan ketiga yang menguntungkan Zara. Isu-isu yang timbul daripada rayuan ini adalah sama ada DSK mempunyai kedudukan sebagai fidusiari dan jika beliau berada dalam kedudukan fidusiari, sama ada beliau telah melakukan perlanggaran tanggungjawab fidusiari.

Dalam rayuan Banita, Banita Sdn Bhd ('Banita'), perayu kedua telah diperbadankan oleh DSK atas nama wakil bagi tujuan penerimaan lesen pembalakan istimewa. Adalah dakwaan responden bahawa DSK bersalah terhadap tujuan fraud dan tidak jujur dan telah bertindak melanggar tanggungjawab fidusiari sebagai pengarah SF dan/atau sebagai pengarah urusan Seranum di mana beliau, antara lain, menyembunyikan secara fraud daripada lembaga pemegang amanah SF ('BOT') dan Seranum fakta bahawa Banita telah memohon untuk dan telah diberikan lesen pembalakan istimewa dan beliau secara sengaja telah gagal dan telah gagal untuk membuat pendedahan berkenaan dengan pengawalan dan kepentingan benifisialnya dalam Banita. Isu untuk diputuskan dalam rayuan ini adalah sama ada seorang pengarah syarikat boleh dikatakan bertanggungjawab bagi perlanggaran tanggungjawab fidusiari di mana syarikat adalah kontraktor kepada kerajaan negeri dan kerajaan negeri telah memberikan faedah yang relevan kepada syarikat yang mana adalah wakil pengarah tersebut.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Keputusan Mahkamah Rayuan yang bertarikh 6 Jun 2003 adalah kekal keputusan Mahkamah Rayuan yang sah yang mana telah dibentuk dengan betul apabila keputusan dibacakan di mahkamah terbuka dalam kehadiran ketiga-tiga hakim Mahkamah Rayuan yang mana masih berkhidmat sepenuhnya sebagai ahli kehakiman. Perkara tersebut ditadbir oleh k 24 Kaedah-Kaedah Mahkamah Rayuan 1994 dan s 42 AMK adalah tidak relevan. Seksyen 42 hanya terpakai apabila sebelum penyampaian penghakiman, mana-mana hakim mahkamah yang mendengar prosiding tidak mampu, melalui penyakit atau sebab-sebab

lain untuk menghadiri pendengaran prosiding atau yang lain, melaksanakan fungsinya sebagai hakim mahkamah tersebut. Adalah benar bahawa penghakiman telah dibaca oleh Mahkamah Rayuan pada 6 Jun 2003 tanpa alasan penghakiman bertulis dan oleh itu tidak terdapat pembacaan alasan penghakiman. Tetapi alasan penghakiman bertulis telah dibaca kemudiannya dan oleh itu, sebenarnya alasan penghakiman telah diberikan (lihat perenggan 9, 13, 14)

(2) Mahkamah juga berpendapat bahawa tidak terdapat keperluan undang-undang bagi pembacaan alasan penghakiman walaupun secara amnya adalah elok memberikan alasan dalam satu-satu penghakiman. Oleh itu, dalam konteks kes ini penghakiman telah dibaca oleh Mahkamah Rayuan pada 6 Jun walaupun tanpa alasan diberikan bukanlah tidak sah. Walaupun, hakim ketiga tidak menyediakan alasan penghakiman bertulis dan tidak menyatakan persetujuannya kepada alasan penghakiman yang lain, dalam perundangan tidak membatalkan dua penghakiman bertulis dua orang hakim yang lain kerana penghakiman telah dibacakan pada 6 Jun 2003 adalah keputusan sebulat suara mahkamah (lihat perenggan 15–16).

(3) Berkenaan dengan persoalan kelewatan dalam menyampaikan alasan penghakiman, kelewatan itu sendiri bukannya alasan yang cukup untuk mentak sahkan penghakiman. Beban adalah terhadap perayu untuk menunjukkan bagaimana kelewatan menjejaskan penghakiman, seperti contoh kelewatan yang mahkamah tersalah tafsir fakta atau menyalahgunakan keterangan. Perayu telah gagal untuk menunjukkan bahawa Mahkamah Rayuan telah melakukan kesilapan. Tarikh efektif untuk memastikan sama ada Mahkamah Rayuan secara sahnya terbentuk adalah 6 Jun 2003. Kesahan adalah tidak terjejas oleh kelewatan dalam hakim-hakim menyediakan alasan penghakiman bertulis (lihat perenggan 17–19).

(4) DSK, pada setiap masa yang material adalah pengarah urusan dan setiausaha dalam subsidiari SF. Oleh itu, daripada jawatan yang dipegang, DSK semestinya mempunyai kedudukan fidusiari. Di atas fakta dan keadaan, DSK tidak melakukan perlanggaran tanggungjawab fidusiari. Beliau tidak menggunakan atau menyalahgunakan maklumat yang diamanahkan milik perayu. Beliau tidak meletakkan dirinya dalam kedudukan di mana terdapat konflik kepentingan. Beliau telah bertindak dengan suci hati terhadap perayu-perayu. Oleh kerana penguasaan TM, DSK dan pengarah-pengarahnya yang lain tidak mempunyai pilihan tetapi mematuhi arahan TM dan melaksanakan keputusannya. Jika terdapat apa-apa perlanggaran tanggungjawab secara teknikal, butiran keadaan kes ini adalah mahkamah tersebut, dalam melaksanakan bidang kuasanya yang fleksibel, akan berpegang bahawa ia seharusnya menolak untuk memberikan apa-apa relief

kepada perayu-perayu kerana ianya mungkin menyebabkan ketidaksaksamaan dan bertentangan dengan kata hati bila melakukannya secara keseluruhannya (lihat perenggan 31 & 34).

(5) Berdasarkan fakta, adalah kewajipan DSK untuk mendapatkan kebenaran daripada BOT sebelum memohon melalui Banita untuk lesen pembalakan khas. DSK telah menerima maklumat berkenaan dengan kawasan berlesen Banita semasa di dalam kapasiti sebagai pengerusi pasukan perunding dan pada masa yang sama adalah pengarah SF. Oleh itu, DSK memegang maklumat berkenaan dengan kawasan berlesen Banita secara amanah untuk SF. Dalam keadaan ini, adalah kes yang sesuai untuk mahkamah campur tangan berkenaan dengan transaksi ini yang terjejas oleh DSK dan memutuskannya bertanggungan untuk pengayaan tidak adil Banita (lihat perenggan 54 & 56).

(6) DSK melanggar tanggungjawab fidusiarinya kepada prinsipalnya, SF dan konflik kepentingan telah timbul apabila beliau memohon melalui Banita untuk lesen pembalakan khas tanpa kebenaran yang diberitahu daripada BOT. Di atas fakta dan keadaan, peraturan ketat bahawa seorang pemegang amanah mestilah menyerahkan keseluruhan keuntungan yang diperolehnya melalui perlanggaran tanggungjawab fidusiari perlu dikendurkan. Ianya bukanlah tidak saksama atau bertentangan dengan kata hati untuk membenarkan relief tersebut yang dipohon oleh responden-responden (lihat perenggan 57).]

Notes

For cases on fiduciary duties, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 236–274.

For cases on grounds of judgment, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1036–1039.

Cases referred to

Bristol and West Building Society v Mothew [1998] Ch 1 (refd)
Chia Yan Tek v Ng Swee Kiat [2001] 4 MLJ 1 (refd)
English v Emery Reimbold & Strick Ltd [2002] 3 All ER 385 (refd)
Industrial Development Consultant Ltd v Cooley [1972] 1 WLR 443 (refd)
Movitex Ltd v Bullock [1988] BCLC 104 (refd)
Murad v Al-Saraj [2005] EWCA CIV 959 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 38(1), 42, 78
Rules of the Court of Appeal 1994 r 24(1), 24(2)
Rules of the Federal Court 1995 r 63, 63(1), 63(2)
Sabah Foundation Enactment 1966 s 11

Appeal from: Civil Appeal Nos S-02–838 of 1999 and S-02–848 of 1999 (Court of Appeal, Putrajaya)

Martin Mann QC (Alexander Decena, Chris Thian and Wilson Lai Wai Shing with him) for the appellants.
John Cherryman QC (Douglas Lind and Afizal Aldin with him) (Lind Willie Wong & Chin) for the respondants.
Zaleha Rose Pandin (Juprin Admal with her) (Senior State Counsel) watching brief for the State Government.

Zulkefli FCJ (delivering judgment of the court):

INTRODUCTION

[1] These are two related appeals fixed for hearing before us. The first, is the Civil Appeal No 02–13 of 2007 (S) which the parties have referred to as 'Zara Appeal'. The second, is the Civil Appeal No 02–14 of 2007 (S) which has been referred to as 'Banita Appeal'. The Zara Appeal is in relation to appeals against the decision of the Court of Appeal in Civil Appeal No S-02–838 of 1999 and No S-02–848 of 1999 given on 6 June 2003 on an appeal from the judgment of the High Court given at Kota Kinabalu on 6 September 1999 in Civil Suit 351 of 1979. The Banita Appeal is in relation to the appeals against the decision of the Court of Appeal in Civil Appeal No S-02–849 of 1999 and No S-02–820 of 1999 given on 6 June 2003 on an appeal from the judgment of the High Court given at Kota Kinabalu on 6 September 1999 in Civil Suit No 352 of 1979. Both the High Court Civil Suit No 351 of 1979 and Civil Suit No 352 of 1979 were heard in a joint trial by the learned judge of the High Court, Ian Chin J wherein the parties involved in the suits and the factual background leading to the dispute between the parties are substantially the same.

PRELIMINARY OBJECTIONS

[2] At the outset of the hearing both parties indicated their intention to raise preliminary objections on a number of issues arising from both the Zara Appeal and the Banita Appeal. We do not find it necessary to deal with these preliminary objections here which we had dismissed as being of no merits except on one issue raised by the appellants in the Zara Appeal in challenging the validity of the decision of the Court of Appeal dated 6 June 2003 on the four grounds set out as follows:

(1) Whether the function of a judge of the Court of Appeal for the purpose of s 42 of the Courts of Judicature Act 1964 ('CJA') includes the delivery of a reasoned judgment.

A (2) As to the operation of ss 38 and 42 of the CJA where a duly constituted Court of Appeal consisting of three judges has pronounced judgment in open court reserving its reasons and,

B (a) only two such judges have subsequently provided written or any grounds of judgment;

(b) these judges have both retired at the date their respective grounds of judgment are pronounced in open court;

C (c) the third judge has neither provided grounds of judgment of his own nor communicated his approval of the grounds of judgment of the others, and further in any event;

(d) the third judge has not been unable, through any known illness or any other cause, to provide any grounds of judgment of his own.

D (3) Whether and in what circumstances inordinate delay affects the validity of a judgment.

(4) Whether there had been inordinate delay which invalidated the judgment in these suits.

E **[3]** In dealing with the appellants' challenge to the validity of the decision of the Court of Appeal dated 6 June 2003 we find it appropriate to state the following chronology of events:

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6 September 1999	Main judgment of Ian Chin J in both suits delivered.
23 March 2001	Conclusion of argument in the Court of Appeal before the coram comprising Her Ladyship Siti Norma JCA [as she then was] and Their Lordships Mohd Saari JCA and Dennis Ong Jiew Fook JCA.
6 June 2003	Decisions of Court of Appeal in both suits announced in open court in the presence of all three judges. Siti Norma JCA stated that the decisions were unanimous.
9 June 2003	Written grounds of judgment signed by His Lordship Mohd Saari JCA who subsequently retired.
5 January 2007	Written grounds of judgment signed by Her Ladyship Siti Norma JCA who then retired.
5 February 2007	Deputy registrar handed copies of the written grounds of judgment to the parties' representatives.

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21 March 2007	Leave to appeal granted to the respective parties by the Federal Court.

[4] It is unfortunate to note from the above chronology of events there is an element of delay in the delivery of the judgment and the written grounds of judgment. However, we are concerned here only on the validity of the decision or judgment dated 6 June 2003. It is to be noted that the Rules of the Court of Appeal and of the Federal Court concerning pronouncement of judgment are, so far as material, identical. Rule 24 of the Court of Appeal Rules provides:

> (1) The judgment of the Court shall be pronounced in Open Court, either on the hearing of the appeal or at any subsequent time, of which notice shall be given by the Registrar to the parties to the appeal.
>
> (2) Such judgment may be pronounced notwithstanding the absence of the Judges who composed the Court or any of them, and the judgment of any Judge not present may be read by a Judge of the Court of Appeal, of a High Court or by the Registrar.

[5] Paragraphs (1) and (2) of r 63 of the Rules of the Federal Court are in the same terms save that the words 'of Appeal, of a High Court' in the last line of para (2) of the Court of Appeal r 24(2) are omitted from para (2) of the Federal Court r 63. For completeness, it is necessary to refer to ss 38(1), 42 and 78 of the CJA.

[6] Section 38(1) of the CJA reads as follows:

> (1) Subject as hereinafter provided, every proceeding in the Court of Appeal shall be heard and disposed of by three judges or such greater uneven number of Judges as the President may in any particular case determine.

[7] Section 42 of the CJA which applies to the Court of Appeal provides:

> (1) If, in the course of any proceeding, or, in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the hearing of the proceeding shall continue before, and judgment or reserved judgment, as the case may

A be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

B (2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceedings shall be re-heard.

C **[8]** Section 78 of the CJA which applies to the Federal Court is in identical terms as s 42 of the CJA.

[9] We are of the view the decision of the Court of Appeal dated 6 June 2003 was and remains a perfectly valid decision of the Court of Appeal which D was properly constituted when the decision was pronounced in open court on 6 June 2003 in the presence of all the three Court of Appeal judges who were then still full serving members of the judiciary. On this issue we would like to refer to the case of *Chia Yan Tek v Ng Swee Kiat* [2001] 4 MLJ 1, a decision of the Federal Court. This was a case where the Federal Court was asked to E set aside its own decision, not the decision of the Court of Appeal.

[10] Very briefly the facts in *Chia Yan Tek*'s case were that a decision of the Federal Court was signed by the two then remaining serving judges on 19 December 2000 (the third judge having previously retired). One of the F two judges who signed (Eusoff Chin CJ) then retired. On 22 December 2000 the judgment of the Federal Court was pronounced in open court by the deputy registrar. At that date only one of the panel of three judges was still serving. The respondents applied to set aside the judgment pronounced on G 22 December 2000 on the ground that it was a nullity. Their application succeeded. In delivering the judgment of the court, Mohamed Dzaiddin CJ said at p 8 D–G:

> The primary question for decision is the effective date of the judgment. Is it the date of giving the judgment or the pronouncement in open court?
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> H In my opinion, there is a clear distinction between the giving of judgment under s 78 of the Act and the pronouncement of the said judgment in r 63 of the Rules. Section 78 of the Act provides that the judgment or reserved judgment shall be given by the remaining judges of the court, not being less than two, and in which case, the court shall be deemed to be duly constituted. This begs the question: I when is the judgment of the remaining judges given? The section does not provide the manner in which the time from when the judgment is to take effect.
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> Rule 63 of the Rules seems to provide the answer. Clearly, r 63 of the Rules provides the mode how a judgment is to be delivered, which is, by pronouncement in open court, and under para (2) of r 63 of the Rules, it may be read by a judge

of the court or by the registrar. It seems that this was also the practice of the House of Lords where the pronouncement is made in open court in a formal way (*W'Field Fr Co v Steel Construction Co* [1968] NZLR 680 at p 686). It must not be forgotten that the Rules have statutory force and are not mere rules of practice. See *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143.

[11] He went on to say at p 9E–F:

For the reasons that I have given, I hold that the effective date of the judgment in the instant case is the date of pronouncement in open court, and not the date when it was signed by the remaining two judges.

[12] The learned CJ further concluded at p 10 as follows:

For the above reasons, the application of the respondents for an order that the judgment dated 22 December 2000 be set aside, is allowed with costs, because on that date, the court was not duly constituted as there was only one remaining judge of the court...

[13] Likewise in the present case we are of the view that the matter is governed by r 24(1) of the Rules of the Court of Appeal and that s 42 of the CJA is not relevant. It would also appear to us that the grounds of objection as raised by the appellants are somewhat wrongly worded or unclear.

[14] With regard to the first ground of objection of the appellants, we are of the view s 42 of the CJA does not apply to the present case in view of the fact that the judgment (without the written grounds of judgment) was pronounced in open court on 6 June 2003 by way of a unanimous decision in the presence of all the three member panel of the Court of Appeal. The Court of Appeal in pronouncing its judgment had also indicated that they will be delivering their written grounds of judgment at a later date. Written grounds of judgment were in fact later delivered by two of the Court of Appeal judges, namely by Siti Norma JCA and Mohd Saari JCA. It is clear that s 42 of the CJA only applies in a situation where before delivery of judgment, any judge of the court hearing the proceeding is unable, through illness or any other cause to attend the proceedings or otherwise exercise his functions as a judge of that court. It is not the case here wherein all the three member panel of the court were present when the judgment was pronounced in open court. It is true in this case that the judgment pronounced by the Court of Appeal on 6 June 2003 was without written grounds of judgment and therefore there was no delivery of a reasoned judgment. However, written grounds of judgment were delivered at a later date and hence there was in fact a reasoned judgment given.

[15] We also take the view that there is no legal requirement for a delivery of a reasoned judgment although generally it is good to give reasons in a judgment. Therefore in the context of the present case the judgment pronounced by the Court of Appeal on 6 June 2003 even without reasons given is not illegal. On this point we would refer to the case of *English v Emery Reimbold & Strick Ltd* [2002] 3 All ER 385 wherein Lord Phillips MR at p 392, inter alia, had this to say:

> There is a general recognition in the common law jurisdictions that it is desirable for judges to give reasons for their decisions, although it is not universally accepted that this is a mandatory requirement — 'There is no invariable rule established by New Zealand case law that courts must give reasons for their decision', per Ellas CJ in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546.

[16] On the grounds of objection No 2(a), (b), (c) and (d) as raised by the appellants, our answer would be that it has to be borne in mind that the judgment given on 6 June 2003 was a unanimous decision of the Court of Appeal which had already been pronounced in open court. Even though the third judge did not provide written grounds of judgment and had not communicated his approval of the grounds of judgment of the others, this does not in law nullify the two written judgments of the other two judges because the judgment pronounced on 6 June 2003 was a unanimous decision of the court. All the three judges agreed to the said decision. It makes no difference that the third judge did not provide a written grounds of judgment although it would have been better or wiser that he also provides a written grounds of judgment.

[17] On the question of delay in the delivery of the grounds of judgment as raised by the appellants under grounds of objection Nos (3) and (4), we are of the view that delay on its own is not sufficient ground to invalidate the judgment. The burden lies with the appellants to show how the delay has affected the judgment, for example the delay is such that the Court of Appeal judges misconstrued the facts or misapplied the evidence. The appellants had failed to show the Court of Appeal had committed such errors.

[18] We would agree that there is a delay between the judgment being reserved on 23 March 2001 and the decision being pronounced in open court on 6 June 2003. However, such delay is not uncommon. In the present case there has been delay by the Court of Appeal in giving their grounds of judgment in respect of the decision pronounced and perfected on 6 June 2003. It is to be noted that the Court of Appeal is not the trial court. The Court of Appeal heard the case on appeal from the decision of the High Court. They were provided with the full record of the proceedings in the trial court in the form of records of appeal and written submission by both sides. For that reason we are of the view they were just as well equipped to give their

judgment on 6 June 2003 and to provide their grounds of judgment on 5 January 2007 as they were on 23 March 2001, the day they concluded the hearing of the appeal. In any event we do not see any error in the judgment of the court which is attributable to the delay.

[19] We would state here that the effective date for ascertaining whether the Court of Appeal was validly constituted was 6 June 2003 and that such validity could not be affected by the delay in the judges providing their written grounds of judgment. We also take the view that the handing out by the deputy registrar of written grounds of judgment on 5 February 2007 was a purely administrative act which has no bearing on the validity question.

[20] For the reasons already stated we dismissed the preliminary objection by the appellants in the Zara Appeal on their challenge to the validity of the decision of the Court of Appeal dated 6 June 2003.

BACKGROUND FACTS OF ZARA APPEAL

[21] We shall first deal with the Zara Appeal. The relevant background facts of the case that could be gathered from the pleadings and the evidence adduced by the parties are as follows:

(1) The appellants had sued the first respondent Datuk Syed Kechik bin Syed Mohamed ('DSK') and his company, the second respondent Zara Sdn Bhd ('Zara') in Civil Suit No 351 of 1979 ('the Zara suit').

(2) The appellants are the Sabah Foundation ('SF') and two of its operating subsidiaries. SF is a statutory corporation with charitable objects incorporated pursuant to the Sabah Foundation Enactment 1966 ('the SF Enactment'). Its powers are exercised by the 'the director' appointed pursuant to s 11 of the SF Enactment.

(3) The second named appellant, Sinsuran Sdn Bhd ('Sinsuran') was incorporated on 18 June 1974 in order to take over the development of projects known at the time as the Kota Kinabalu Seafront Projects and SF's buildings projects, viz, the provision of offices and public amenities throughout Sabah. There were to be sixteen buildings, the most important and costly of which was to be a new headquarters building for SF at Kota Kinabalu ('the Tower'). SF and Sinsuran entered into an agreement to this end on 5 May 1975. (See Vol 12 pp 4353–4368 of the appeal record.)

(4) The third named appellant, Seranum Sdn Bhd ('Seranum') was incorporated on 29 June 1974. The objective behind its formation was described in a report written by the first named respondent as SF director as follows:

The Sabah State Government has indicated to the Sabah Foundation during the early part of 1974 that the Government would require the Sabah Foundation or its subsidiary company to construct certain Sports Complexes, etc in the various towns in the State of Sabah for and on behalf of Government and that to enable these projects to be realised the government will grant to the Sabah Foundation or its subsidiary company a timber licence to enable the Sabah Foundation or its subsidiary company to generate the requisite funds to meet the costs of the projects concerned. (See Vol 7 p 2032 of the appeal record.)

(5) Seranum was duly issued with a special timber licence on 1 April 1975 and entered into an agreement with the State Government of Sabah ('SG') on 12 June 1975 whereby Seranum undertook to utilise the proceeds of exploitation of the timber land in and towards the construction of the complexes. It also took on the task of building a dual carriageway road link between Kota Kinabalu and the Inanam Peninsular to the North ('the Coastal Highway') which like the Tower is a SF project.

(6) Zara is a land development company incorporated by DSK and his brother, Syed Salem Albukhary ('SSA') on 27 December 1969. They had incorporated Zara under the name Kinabalu Engineering & Construction Co Sdn Bhd on 30 January 1970 but changed the name to Zara Sdn Bhd on 28 September 1971.

(7) Zara's initial share capital of RM200 was increased in 1972 to RM2,100,000 reflecting exchanges of interests in land for shares in Zara of a number of individuals. (See Vol 6(1) p 1273 and Vol 9 p 3359 of the appeal record). At all material times DSK had been its managing director and in sole control and had a substantial direct or indirect beneficial interest in the company.

(8) DSK, a lawyer was the political and legal advisor to Tun Mustapha ('TM'), Chief Minister of Sabah between 1967 and April 1976. Throughout this period he was also the SF director, in which capacity as provided for under s 11 of the SF Enactment, he could do such things as SF's board of trustees allowed. TM was one of the individuals mentioned above who in 1972 had exchanged interests in land for shares in Zara.

(9) The appellants alleged that DSK and others in concert with him including TM had then set out to acquire, to accumulate and to consolidate the titles into a single holding for a massive development in due course comprising some 2,453 acres of land, part of the Inanam Peninsular, which became known respectively as 'the Zara Project' and the 'Zara Project Land'.

(10) The appellants also alleged DSK was wearing a number of hats throughout the entire period in addition to being Zara's controller. The more important of these for present purposes were his position as the SF director and as managing director of Sinsuran and Seranum.

(11) The appellants contended that DSK had failed to make full disclosure to SF of the Tower and the Coastal Highway projects, both of which he had actively fostered and encouraged. An example is that he caused Zara to cede 7 acres to SF free of charge as a site for the Tower but with full easements of way linking the Zara Project Land to the Coastal Highway when built. Zara for its part was to contribute 50% of the cost of construction of this road to Seranum.

(12) It is to be noted that in the 1960's and 1970's, SG was embarking on its policy to develop its tourism industry. It would appear that DSK who was then the Chairman of the Sabah Tourist Association took up SG's offer that the private sector would be given every encouragement to build hotels and the tourist attractions through various forms of incentives like the construction of access roads and the provision of water supply to the areas to be developed as potential tourist centres.

(13) With that objective DSK started purchasing private alienated land from individuals and in the process acquired 120 parcels of such land. At the same time through his associate companies, Segama Sdn Bhd and Zara, he managed to secure 1007 acres of swamp and sea-bed land from SG.

(14) It was DSK's intention that the Zara land were to be developed as a tourist resort in providing the ancillary commercial and residential development. This was to be the Zara project. The Zara land are ideally situated stretching along the most attractive beaches in Sabah and located about five miles from Kota Kinabalu town and six miles from the International Airport.

(15) On 1 July 1975, all the Zara land covering an area of about 2,453 acres were consolidated and registered under one title in the name of Zara, as the sole owner. The terms of the title are:

(i) that the Zara land were to be developed into a tourist complex with related commercial, and residential development to accommodate the objects of the Zara project;

(ii) that sixty acres were reserved for government buildings.

(16) Initially the Zara land lacked access. A cable-stay bridge was constructed in 1972 which was paid for solely by Zara and completed in 1994. The cable-stay bridge is to provide access to the southern part of Zara land.

(17) The other development that followed was the construction of a thirty storey Tower Block ('the Tower'), the headquarters of SF on the part of

A the Zara land that had been reserved for government use, as well as a coastal highway to make direct access to the Zara land possible from Kota Kinabalu. The implementation of these two projects has led to the allegations that DSK as a director of SF had committed SF to spend large sums of money as SF entered into a contract with Seranum for the
B latter to do the piling works as well as the construction of the Tower on the Zara land. Likewise DSK induced SF to enter into a contract with Sinsuran to construct the coastal highway which benefited Zara.

(18) It is the appellants' case that the construction of the thirty storey Tower
C Block and the coastal highway project have enhanced the value of the Zara land as seen from the RM40,929,011 awarded as compensation when the Zara land were compulsorily acquired by SG on 14 October 1976.

(19) It is the claim of the appellants that whatever profits derived by DSK
D and Zara from the enhancement of the Zara land following the developments should rightly belong to them on the following grounds:

(i) DSK being the director/trustee of SF and managing director of Sinsuran and Seranum made use of the opportunity and knowledge
E acquired by him as their fiduciary agent to commit SF with the construction of the Tower and the coastal highway ('the two projects') for his own benefit.

(ii) DSK's sole purpose for committing SF to the two projects was to enhance the value of the Zara land for his and Zara's benefits.
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(iii) such commitments were done without the authority of SF or of the board of directors of Sinsuran and Seranum.

(iv) DSK failed to disclose to SF and the board of directors of Sinsuran and Seranum of his personal interests in the two projects.
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(20) In the pleadings SF, Sinsuran and Seranum claimed reliefs against DSK namely:

(i) a declaration that DSK is accountable to them for the profits
H resulting from the enhancement of the Zara land and an order for the payment of the sum due.

(ii) alternatively that DSK is accountable to SF, Sinsuran and Seranum for committing them to the two projects and an account for any sum
I due and an order for payment.

(21) SF, Sinsuran and Seranum also claimed reliefs against Zara namely:

(i) a declaration that Zara is a constructive trustee for them of the Zara land to the extent that such lands have been enhanced in value;

(ii) an account of all profits made;

(iii) an order for payment out of any sum due.

FINDING OF THE HIGH COURT

[22] The learned judge of the High Court held that DSK's actions amounted to breaches of his fiduciary duties and he, inter alia, made the following findings:

(1) that it was DSK and not the then Chief Minister, TM who had decided on the construction of the Tower and had it sited on the Zara land;

(2) that DSK was responsible for getting the coastal highway constructed;

(3) DSK never declared his interests in Zara in arriving at the above decisions;

(4) there is no record to show that SF had consented to the implementation of the two projects;

(5) that the construction of the two projects benefited DSK's interests as it enhanced the value of the Zara land;

(6) that all decisions made were possible because of DSK's influence, power, manipulation and the trust that TM had for him.

[23] The learned judge however rejected the arguments of SF, Sinsuran and Seranum that DSK was dishonest or that he had an improper dominant motive to benefit Zara by the construction of the two projects, for lack of proof.

[24] Based on his finding that DSK had breached his fiduciary duties to SF, Sinsuran and Seranum, the learned judge held that the appropriate remedy is the disgorgement of the profits made and this must mean the enhancement in the value of the Zara land. Relying on the evidence of Chong Choon Kim ('Chong') the valuer who testified for SF, Sinsuran and Seranum, the learned judge fixed the enhancement factor at 25.35% of RM40,929,011, this being the sum awarded as compensation following the compulsory acquisition of the Zara land in 1976, and assessed the profits made by DSK and Zara to be RM10,375,504 and judgment for this award was entered against DSK and Zara.

[25] DSK and Zara filed appeals against the decision of the learned judge of the High Court against the main judgment delivered on 6 September 1999. SF, Sinsuran and Seranum filed a cross- appeal against the finding of the learned judge of the High Court in rejecting their argument that DSK

was dishonest or that he had an improper dominant motive to benefit Zara by the construction of the two projects, for lack of proof. SF, Sinsuran and Seranum also filed an appeal against the judgment on interest given by the learned judge of the High Court on 10 September 1999 as in Civil Appeal No S-02–848 of 1999.

FINDING OF THE COURT OF APPEAL

[26] The Court of Appeal in its decision dated 6 June 2003 reversed the finding of the High Court and allowed with cost before it and the court below the appeal by DSK and Zara in Civil Appeal No S-02–838 of 1999. The Court of Appeal also dismissed the cross-appeal by SF, Sinsuran and Seranum. As regards the appeal by SF, Sinsuran and Seranum (the appellants) in Civil Appeal No S-02–848 of 1999 the Court of Appeal affirmed the decision of the High Court on the issue of interest awarded to the judgment entered for the appellants.

[27] Before the Court of Appeal, the learned judge of the High Court's findings on liability were attacked based on the following issues:

(i) whether DSK had committed a breach of his fiduciary duty not to be disloyal when he committed SF, Sinsuran and Seranum on the construction of the two projects;

(ii) whether DSK was dishonest or that he had a dominant improper motive to benefit him when he committed SF, Sinsuran and Seranum in the implementation of the two projects thereby committing a breach of his director's duty of good faith.

[28] The Court of Appeal was of the view the determination of the above two issues is dependent on the finding as to who made the decisions to site the Tower on Zara land and to construct the coastal highway. Both Her Ladyship Siti Norma JCA and His Lordship Saari JCA made a finding that the decision was that of the state government in the person of TM, the Chief Minister. In doing so, they took into account, inter alia, the following factors:

(i) TM's dominant, forceful and charismatic personality:

(ii) TM's unforgiving attitude towards those who did not immediately carry out his demands;

(iii) TM's hands on knowledge and control of all important matters in the state;

(iv) The fact that TM could not be manipulated by people with ulterior motives (it was the evidence of the appellants' witness former Chief Minister Datuk Harris Salleh that TM was nobody's tool);

(v) The fact that SF and its subsidiaries were government department under the Chief Minister's department and were treated as such by Ministers and civil servants alike;

(vi) The fact that Seranum was expressly incorporated as the government's contractor for the purpose of constructing sports complexes and stadium on the government's behalf, utilising the proceeds of timber stands granted to Seranum to defray the cost.

THE APPEAL

[29] On their application for leave to appeal to the Federal Court heard on 21 March 2007, the appellants had submitted, inter alia, that the Court of Appeal should have held DSK liable on account of his position of conflict and failure to secure the informed consent of his principal to his involvement in the Zara Project. This led the Federal Court to conclude that the question or issue to be determined on the hearing of the appeal should be, 'Whether a company director can absolve himself from liability for breach of duty by blaming dominance of another person'. However, in the course of argument at the hearing before us it was agreed by both parties that the question of law be reframed for the determination of this court which reads as follows:

> Whether the respondents are liable on account of the failure of the first respondent at any material time to disclose to the appellants his interest in the second respondent and/or the Zara project land and in particular his failure to seek the informed consent of the first appellant to his having any involvement in the decisions to commit the appellants to the Tower and coastal highway projects (irrespective by whom such decisions were made) and in the related transaction in June 1975 under which the second respondent voluntarily ceded seven acres of the Zara Project Land to the first appellant to accommodate the Tower.

[30] We would approach the issue raised in this appeal by first examining whether DSK is in a position of a fiduciary. It further follows if DSK is in the position of a fiduciary whether he had committed any breach of fiduciary duty. In law the position of the fiduciary and his obligation have been succinctly stated by Millet LJ in the English case of *Bristol and West Building Society v Mothew* [1998] Ch 1 to be as follows:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be

an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere competence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

[31] In the present case at all material times, DSK had been both the managing director and secretary in Sinsuran and Seranum, subsidiaries of SF. Under those circumstances and from the position he held in SF, Sinsuran and Seranum, we are of the view DSK must be in a position of a fiduciary. DSK was placed in a relationship of confidence and trust and he was obligated by law to be loyal to the principal.

[32] As to the issue of whether DSK is guilty of a breach of fiduciary duty, it is our judgment that it has to be shown DSK has been disloyal to SF and this is a question of fact which can only be gleaned from the evidence adduced before the High Court.

[33] We are also of the view in order to succeed in this case the appellants have to prove not only breach of fiduciary duties by the first respondent but also consequential enhancement of the value of the subject premises of which the respondents ought to be made to disgorge.

[34] As to the question of whether DSK had been disloyal to his principal, we are of the view the Court of Appeal had not made any error of law in its decision in finding that DSK did not commit any breaches of fiduciary duty. We agree with the findings of the Court of Appeal that the learned trial judge was wrong in concluding that DSK had committed a breach of fiduciary duty. It is the appellants' pleaded case that DSK committed the appellants to the Tower project on the Zara land and the coastal highway project with the sole or primary purpose of benefitting the respondents of the Zara land in which they were interested. The onus was on the appellants to prove that DSK made the decisions to build the Tower on the Zara land and the coastal highway project. We find the appellants failed to discharge this onus. Without evidence or justification, the learned judge wrongly held that DSK made these decisions. We find that the learned judge's findings were based on unjustifiable inferences, speculation, his own preconceived impressions and prejudice. The learned judge's conclusion was that DSK's manipulative ability led TM to come to a decision to have the Tower sited on the Zara land. The only instance of manipulative ability given by the learned judge was that he asserted, without supporting evidence, that DSK could 'drag everyone of

influence like TM or the family of the then deputy or acting Chief Minister to take shares in Zara ...'. Such inference of manipulation was unjustified and did not support the conclusion that DSK led TM to decide to have the Tower on Zara land. Moreover, we find such conclusion was totally inconsistent with the evidence of Datuk Harris Salleh, the former Chief Minister of Sabah who agreed in cross-examination that TM was nobody's tool. (See notes of proceedings Vol 3 p 69 of the appeal record).

[35] We have to state here that the direct evidence as to the identity of the person who made the decisions of the two projects could only have come from the two people concerned, namely TM and DSK himself. Both were unavailable as TM had passed away before the trial and DSK was too ill to testify. That left the judge with only the oral evidence of SSA, Tengku Zainal Adlin bin Tengku Mohamad, SF's project manager and the documentary evidence.

[36] It is the contention of the respondents as argued by their learned counsel Mr Cherryman QC that the siting of the Tower on Zara land was that of the decision made by TM. To the respondents TM was all powerful in the state and brooked no opposition. TM took pride in SF and made his decisions for it on all matters of importance. To TM the siting of the Tower was a matter of importance. All the witnesses who testified to TM's character and their impressions of him painted him to be a dominant and forceful person who had complete control over people who worked for him. He was used to having his own ways and if he wanted something done, it had to be done first with expected results. The learned trial judge however rejected the evidence of these witnesses and in particular he did not believe SSA to be a credible witness. We are of the view the evidence of these witnesses who are known to TM should not be totally disbelieved. We find the learned judge's attack on the credibility of SSA as unwarranted and does not stand up to examination having regard to the extremely prejudiced view he held about SSA's conduct as is apparent in his judgment.

[37] It is to be noted that TM had regarded the development of SF as an extension of his duties as the Chief Minister of Sabah. He had mooted the idea of building a prestigious building to be the Headquarters of SF. That was in March 1974, and what he had in mind was a 21-storey building in downtown Kota Kinabalu facing the water front. But he could not realise this as the Civil Aviation Department had barred the construction of all buildings 12 storey and above in Kota Kinabalu because of flight restriction as the international airport is sited closely. TM had to seek another site and the Zara land was the alternative as its title had earmarked sixty acres for the construction of the government building.

[38] We are also of the view since DSK was TM's political and legal adviser, it would have been the most natural thing for TM to turn to DSK for his advice. However to conclude that DSK had the manipulative ability to literally coerce TM to decide on the siting of the Tower on the Zara land would be too far fetched bearing in mind that TM was known then to be a proud and forceful person, not one that could be swayed easily into making decisions which he considered not to be his own.

[39] As regards DSK's signature which appeared in the relevant documents that made it possible for the Tower to be constructed on the Zara land, we agree with the finding of the Court of Appeal that as the registered owner at the relevant time, Zara had to execute those documents through its managing director, DSK. Furthermore, we find in relation to the seven acres site for the Tower it should be pointed out that it was not necessary for the said land to be re-assigned to the state government. The state government was simply able to resume beneficial possession, as the said seven acres site form part of the sixty acres of land already reserved for government purposes. In the circumstances of the case, it is our considered view that it was wrong for the learned trial judge to conclude that it was DSK who manipulated TM to have the Tower sited on the Zara land.

[40] With regard to the construction of the coastal highway, like the Tower project it was very much a government project as seen from the master plan reflected in the *Robinson Report* of the Government of the State of Sabah. Despite this, the learned trial judge made the following conclusion:

> Because the construction of the Coastal Highway benefited Zara Project, with no detrimental effect, it provided the clearest indication that DSK desired it and thus he either made or caused the decision to be made to have the coastal highway built. It is beyond doubt that he decided on it if his influence, power, manipulations and if the trust by TM in him are also taken into account. I have said that Zara land benefited because I, for the reasons appearing below accept the evidence of the valuer Chong Ching Kim ('Chong').

[41] On the above conclusion made by the learned trial judge, we find that it was not supported by evidence and was based on groundless inferences and preconceived impressions and it was contrary to the evidence that it was in substance made and dictated by the state government ('SG'). The learned judge in our view appears to have ignored or rejected the positive evidence that the decision to build the coastal highway was that of the SG and such evidence includes, inter alia, the following:

(i) A letter dated 14 June 1975 from Acting Chief Minister to the Secretary, Natural Resource ('SNR') and a letter dated 30 June 1995 from SNR to SF. (See Vol 20 pp 6023–6024 of the appeal record).

(ii) Minutes of meeting dated 16 August 1975 (see Vol 20 pp 2437–2442 of the appeal record).

(iii) The evidence of Tengku Adlin that it was a SG decision that the coastal highway should be build and paid for by Seranum for the SG out of the proceeds of the timber license and that in the event Seranum failed to pay for the costs of constructing the coastal highway, the SG would pay for such costs (see Vol 3 pp 821-823 of the appeal record).

[42] Another factor which the learned trial judge relied to establish that it was DSK who made the decision to have the coastal highway constructed was his finding of the benefit that Zara would derive from that infrastructure. In the learned judge's view the benefit would be the enhanced value of the Zara land. The Court of Appeal rejected such a finding which we agree. In our view in any event the construction of the coastal highway made access possible throughout the Sabah Peninsular, and not to the Zara land specifically.

[43] We would like to state here even assuming the appellants could establish any breach of fiduciary duty by DSK, the appellants' claim would still bound to fail because no enhancement value of the subject premises whatsoever has been proved. The appellants' valuer, Chong Chung Kim ('Chong') admitted in cross-examination that he made no adjustments when applying to the subject premises an enhancement factor he claimed to have derived from a wholly different examples (a new race course and a new port). On this point we find the Court of Appeal was right in its finding that the learned trial judge had erred in accepting Chong's evidence in toto.

CONCLUSION

[44] To sum up we would state based on the facts and circumstances of the case, DSK, the first respondent did not commit any breach of fiduciary duty. He did not use or misuse trust information belonging to the appellants. He did not place himself in a position where there was a conflict of interest. He acted in good faith towards the appellants and each of them. Our view is further fortified by the fact that even the learned trial judge expressly found that the essential allegations as in the appellants' pleaded case were not established, namely that DSK had been dishonest and had committed the appellants to the projects with the sole or primary purpose of enhancing the value for the Zara land. The reality of the situation was that, due to the dominance of TM, DSK and his fellow directors had no choice but to comply at once with TM's directive and give effect to his decisions. If there was technically any breach of duty, we are of the view the particular circumstances of this case are such that the court, in the exercise of its flexible jurisdiction, would take the stand that it should refuse to grant any relief to the appellants

because it would be totally inequitable and contrary to conscience to do so. (See the case of *Murad v Al-Saraj* [2005] EWCA CIV 959).

[45] For the reasons already stated our answer to the question framed in this appeal would be in the negative. We would therefore dismiss the appeal herein with costs.

THE BANITA APPEAL

[46] We shall now deal with the Banita Appeal. The relevant background facts of the case are as follows:

(1) Sabah Foundation ('SF') was established under the Sabah Foundation Enactment (No 8) 1966 with Tun Mustapha ('TM') as the founding chairman. Datuk Syed Kechik bin Syed Mohamed ('DSK') the first appellant became its first director and was also appointed as a trustee of the board of trustees of the Sabah Foundation, the first respondent.

(2) On 18 September 1969, the State Government of Sabah ('SG') formulated a policy as contained in Cabinet Paper No 53/69 whereby the government would take back the balance of timber area reserved for 12 concessionaires. Further, the government conceived a plan to build a stadium and sport complex in major towns in Sabah.

(3) On 22 September 1969 DSK was appointed to head the negotiating team ('NT') to negotiate with the 12 concessionaires with the view to take back the balance of concession area reserved for them.

(4) On 28 December 1970, TM granted to SF timber concessions of 3,000 sq miles to fund activities and also granted 300 sq miles as management reserve.

(5) DSK in a report informed the Secretary for Natural Resources that the total area to be taken back from the 12 concessionaires was 241.562 sq miles which area included 39.625 sq miles surrendered by Wallace Bay Sdn Bhd ('Wallace Bay'). The present appeal is concerned with this area of 39.625 sq miles surrendered by Wallace Bay.

(6) An agreement was reached between Wallace Bay and the NT on 17 April 1974 resulting in the said company surrendering to the government 15% of the 20% management reserve.

(7) The second named respondent Seranum Sdn Bhd ('Seranum') was incorporated on 29 June 1974. DSK became its managing director. DSK explained the objective behind the formation of Seranum in a report as follows:

The Sabah State Government has indicated to the Sabah Foundation during the early part of 1974 that the government would require the Sabah Foundation or its subsidiary to construct certain sport complexes, etc in the various towns in the State of Sabah for and on behalf of government and that to enable these projects to be realised the government will grant to the Sabah Foundation or its subsidiaries a timber licence to enable the Sabah Foundation or its subsidiary company to generate the requisite funds to meet the costs of the projects concerned.

(8) Banita Sdn Bhd ('Banita') the second appellant was incorporated by or on behalf of DSK on 4 November 1974 in the name of nominees for the purpose of receiving a special timber license which was granted by the SG on 4 April 1975 in respect of an area of 39.625 sq miles surrendered by Wallace Bay. On the same date 4 April 1975 a special timber license was issued to Seranum for 142.362 sq miles.

(9) On 15 April 1976, the government headed by TM was voted out of office. DSK ceased to be the director of SF on 23 June 1976 and resigning as a director of Seranum on 10 July 1976.

(10) It is the respondents' case that DSK was guilty of a fraudulent and dishonest design and acted in breach of his fiduciary duty as director of SF and/or as managing director of Seranum in that:

(i) he deliberately failed and neglected to make the necessary arrangements with which he was expressly entrusted by the state government for the whole of the surrendered areas to be given to SF or Seranum;

(ii) he made use of the opportunity and knowledge acquired by him as fiduciary agent of SF and Seranum to make a profit for himself and/or Banita.

(iii) he fraudulently concealed from the Board of Trustees of SF and Seranum the fact that Banita had applied for and been granted a special timber license over the Wallace Bay area and he deliberately failed and neglected to make any disclosure of his control of and beneficial interest in Banita;

(iv) he dishonestly informed the state government that SF had agreed to the special timber license over the Wallace Bay area being given to Banita and did so without the knowledge of SF or any proper authority.

(11) By reason of such breaches of duty by DSK as aforesaid the respondents' claimed they have suffered damage namely, the loss of a special timber license over the Wallace Bay area.

(12) In the pleadings SF and Seranum claimed reliefs against DSK namely:

(i) a declaration that DSK is accountable to them for all profits made by him arising out of the issue of the special timber license over the Wallace Bay area to Banita;

(ii) further or in the alternative, a declaration that DSK is accountable to them for the profit which would have accrued to them if the special timber license over the Wallace Bay area had been issued to them together with the remainder of the surrendered areas;

(iii) an enquiry into the amount of such lost profits and an order for payment of the sum due thereon;

(iv) damages.

(13) SF and Seranum also claimed reliefs against Banita namely:

(i) a declaration that Banita at all times held the special timber license issued to it over the Wallace Bay area as constructive trustees for them;

(ii) an account of all profits made by Banita arising out of the issue of the special timber license;

(iii) an order for payment of the sum due thereon;

(iv) damages.

FINDINGS OF THE HIGH COURT AND THE COURT OF APPEAL

[47] The learned judge of the High Court held that DSK was liable for breach of fiduciary duty and awarded the respondents a combined sum of approximately RM29m (including compound interest) and costs. The RM29m comprised what the learned trial judge described as a restitutionary element of RM6,417,915.00 and a compensatory element of RM23m. The appellants appealed. The Court of Appeal dismissed the appellants' appeal with respect to liability but reduced the trial judge's award to RM6,417,915 and substituted the award of compound interest with simple interest. The Court of Appeal, inter alia, held that the learned judge of the High Court was wrong in finding that the Banita license Area was earmarked for SF or Seranum, but nevertheless upheld the High Court's finding on liability on the

basis that DSK had made use of trust information belonging to SF. It is the Court of Appeal's finding with respect to liability which the appellants now appeal.

THE APPEAL

[48] At the sitting of the Federal Court on 21 March 2007 the Federal Court granted the appellants leave to appeal with the question or issue for determination as follows:

> The unjust enrichment point: Can a director of a corporation be held liable for breach of fiduciary duty where the corporation is merely the contractual agent of the third party, being the State Government, which gave the benefit to the director?

[49] At the hearing of the appeal before us the above question or issue for determination was however amended with agreement by both parties to read as follows:

> Can a director of a corporation be held liable for breach of fiduciary duty where the corporation was a contractor to the State Government in the terms of the Agreement dated 12 June 1975 (referred to in the Record) and the State Government granted the relevant benefit to a company which was the nominee of the director?

[50] Learned counsel for the appellant submitted it was the decision of the State Government of Sabah ('SG') that the vehicle for carrying out the project to construct stadiums and sports complexes in the major towns throughout Sabah for the SG was to be Seranum, a subsidiary of SF as evidenced by the agreement dated 12 June 1975 ('the 1975 agreement'). It was argued for the appellants that Seranum was therefore the contractual agent of the SG for the purpose to construct stadiums and sports complexes to be financed from funds generated from its special timber license area of 142.362 sq miles. The appellants further contended that it was clear that SG decided Banita to have the Banita license area of 39.625 sq miles of the Wallace Bay and that the Banita license area was never earmarked for SF or for its subsidiary Seranum.

[51] The appellants took the stand that SF was effectively a government department within the CM's own department. TM as CM and Chairman of SF took the decisions for the SG. He knew exactly what he was doing and he was not capable of being manipulated by DSK. DSK did not place himself in a position where there was any conflict between his personal interests and his duties owed to SF and Seranum. The appellants also contended there was no misuse of trust information by the appellants which, if there was any, belonged to SG not to SF or Seranum.

A **[52]** Learned counsel for the appellants submitted that if the circumstances of the case the Court of Appeal was wrong to hold the appellants liable in the absence of any earmarking of the relevant land area and when Seranum's principal was the SG which decided to grant the Banita license area to Banita and not to Seranum. Further, or in the alternative, learned counsel for the B appellants submitted that as a matter of law, the strict rule (derived from English cases) that a trustee must disgorge the entirety of any profit made by him in breach of fiduciary duty, should be relaxed where it would be inequitable or contrary to conscience to grant such relief.

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[53] Contrary to the contention of the appellant, it is our considered view that SF was and is an independent corporate entity. It is not and has never been simply a department of SG. SF should be viewed as any other corporate entity. It is common ground that SG intended to grant SF the land areas D including the Wallace Bay taken back from the timber concessionaires to be worked on by SF and the profits used to build stadiums and sports complexes in every major town in the state. The special timber license carried the intention of SG to make the grant by issuance of the license into effect. The 1975 agreement established the mechanism for working and using the profits. E Under these arrangements Seranum acquired total control over the gross proceeds of exploitation of the timber land, subject to conditions. Any surplus, after completion of the sports complexes would ultimately go to SG to be held on trust for the maintenance of the complexes. In these circumstances we are of the view it would be untenable to label Seranum as F being merely an agent of SG.

[54] We also observed that DSK did not seek the consent of the Board of Trustee of SF ('BOT') to the grant of the special timber license area to Banita. The evidence at the trial also did not establish that TM was aware of it. To G the contrary, it pointed very strongly the other way. For instance, the application for the license was made to the Acting Chief Minister, not to TM. The learned trial judge noted TM's prolonged absence from Sabah during the relevant period. The reference to the unnamed third party in DSK's letter dated 3 March 1975 to the Secretary of Natural Resources is best evidence H that SF did not know of his interest in Banita. On this point we are in agreement with the finding of the Court of Appeal that it was the bounden duty of DSK to obtain informed consent from BOT before applying through Banita for special timber license of Wallace Bay area. As rightly stated by the Court of Appeal if SF were to evince intention that it had no intention of I applying for special timber license of Wallace Bay area, only then would it be proper for DSK through Banita to apply for the same.

[55] We would add by stating that there is a duty placed upon DSK to offer any and every opportunity to Seranum of which he became aware in his

various capacities for SG, SF and Seranum to include the Wallace Bay area in the special timber license, irrespective of 'earmarking'. It was held, inter alia, in the case of *Industrial Development Consultant Ltd v Cooley* [1972] 1 WLR 443 that a fiduciary in a position comparable to that of DSK in the present case must account for a benefit even if it would not have accrued to the principal had the fiduciary done his duty. Only the informed consent of the principal to the fiduciary taking the benefit absolves the fiduciary from the obligation to account in these circumstances. In the present case the Wallace Bay area was such a benefit to DSK and in this respect we find DSK had failed to obtain the informed consent.

[56] We would also agree with the finding of the Court of Appeal that DSK received information about Banita licensed area ie the Wallace Bay timber area whilst in the capacity of Chairman of NT. At the same time then, DSK was also a director of SF. In our view DSK held the information about Banita licensed area on trust for SF. A conflict of interest arose when DSK, through Banita, applied for and was offered the Wallace Bay timber area. We are of the view it is an appropriate case for the court to intervene with regard to this transaction effected by DSK and hold him liable for the Banita's unjust enrichment. On this point we would like to refer to the case of *Movitex Ltd v Bullock* [1988] BCLC 104 wherein Vinelott J had this to say:

> The true principle is that if a director places himself in a position in which his duty to the company conflicts with his personal interest or his duty to another, the court will intervene to set aside the transaction without inquiring whether there was any breach of the director's duty to the company. That is the over-riding principle of equity.

CONCLUSION

[57] In conclusion we would state that DSK was in breach of his fiduciary duty to his principal, SF and a conflict of interest had arisen when he applied through Banita for the special timber license of the Wallace Bay area without the informed consent from BOT. On the facts and circumstances of this case we do not think the strict rule that a trustee must disgorge the entirety of any profit made by him in breach of fiduciary duty, should be relaxed as contended by the appellants. In the present case we are of the view it would not be inequitable or contrary to conscience to grant such reliefs as sought by the respondents.

[58] For the reasons above stated our answer to the question posed in this appeal would be in the affirmative. We would affirm the Court of Appeal's

A decision in finding DSK liable for breach of fiduciary duty. We therefore dismissed the appeal herein with costs.

Appeal dismissed with costs.

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Reported by Brendan Navin Siva

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